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No. 06-152

IN THE

# Supreme Court of the United States

R & F PROPERTIES OF LAKE COUNTY, INC.,
*Petitioner*,

v.

UNITED STATES OF AMERICA *EX REL.* KARYN L. WALKER,
*Respondent*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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# MOTION FOR LEAVE TO FILE BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as amicus curiae in support of Petitioner. Counsel for Petitioner has consented to the filing of this brief. Counsel for Respondent has refused consent because she believes the petition should not be granted.

WLF is a non-profit public interest law and policy center based in Washington, D.C., with supporters in all 50 states. WLF devotes a substantial portion of its resources

to promoting a limited and accountable government, supporting the free enterprise system, and opposing abusive enforcement actions and civil litigation by the government and private litigants. WLF regularly participates in important constitutional and statutory litigation raising these issues.

More pertinently, WLF has appeared before this Court and other federal courts in cases raising significant issues regarding the application of the *qui tam* provisions of the False Claims Act (FCA). *See, e.g.*, *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997); *Boeing Co. v. United States ex rel. Kelly*, *cert. denied*, 510 U.S. 1140 (1994); *Riley v. St. Luke's Episcopal Hospital*, 196 F.3d 514 (5th Cir. 1999).

In addition, WLF's Legal Studies Division produces and distributes legal public policy publications on numerous topics, including the False Claims Act. *See, e.g.*, J. Andrew Jackson & Edward W. Kirsch, THE *QUI TAM* QUAGMIRE: UNDERSTANDING THE LAW IN AN ERA OF AGGRESSIVE EXPANSION (WLF Monograph) (1998); John T. Boese, *New False Claims Law Incentives Pose Risk To Contractors And States* (WLF Working Paper) (June 2006); J. Andrew Jackson, *A Law Gone Rogue: Time To Return Fairness To The False Claims Act* (WLF Legal Backgrounder) (Dec. 16, 2005).

WLF submits that over the last two decades, the 1986 amendments to the FCA have spawned abusive punitive litigation against businesses, both large and small, to the detriment of those businesses, their employees, their shareholders, and the public at large. The decision of the court of appeals below is particularly troubling inasmuch as the punitive provisions of the FCA are predicated on the

petitioner's reasonable interpretation of confusing and ambiguous regulations or contract provisions. WLF believes that it can bring an additional perspective to the issue presented in this case and assist the Court in deciding whether to grant the petition.

For the foregoing reasons, WLF respectfully requests that it be allowed to participate in this case by filing the attached brief as amicus curiae.

Respectfully submitted,

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## QUESTION PRESENTED

Whether liability under the civil False Claims Act, 31 U.S.C. §§ 3729-3733, can be based on a defendant's reasonable interpretation of an ambiguous regulation or contractual provision?

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# BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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## INTERESTS OF AMICUS CURIAE

The interests of amicus curiae Washington Legal Foundation (WLF) are set forth in the motion accompanying this brief.[1]

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF, contributed monetarily to the preparation and submission of this brief.

## REASONS FOR GRANTING THE PETITION

This case raises an issue of exceptional and national importance: whether the False Claims Act (FCA) may be used to punish persons for making claims for payment from the government when the allegedly "false" or "fraudulent" claims are based on reasonable interpretations of ambiguous agency regulations or contract provisions. Here, the FCA suit arose under complex Medicare billing regulations that the court of appeals recognized were ambiguous. *See* Pet. App. at 5 ("We agree that the regulatory language in effect . . . was ambiguous.").

By reversing the district court's grant of summary judgment for the petitioner and allowing the suit to proceed, the Eleventh Circuit improperly expanded the FCA beyond the parameters established by Congress. Permitting FCA actions to go to trial in this and other cases based on ambiguous agency regulations, directives, manuals, and contract provisions, undermines the FCA as a credible deterrent against fraud, encourages frivolous and costly lawsuits, and raises grave due process concerns by unfairly imposing substantial penalties in a way Congress never intended.

As the petition makes clear, the Eleventh Circuit's ruling not only is wrong, but also is in conflict with the decisions of other circuits and lower federal courts. Pet. at 9-21. Accordingly, this case, which presents a pure question of law, is an ideal vehicle for the Court to settle the important question of whether a reasonable interpretation of an ambiguous regulation or contract

provision can give rise to an FCA claim.[2]

## I. THE PETITION RAISES AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT

### A. FCA Liability Was Greatly Expanded in 1986

The FCA permits private citizens to bring a "*qui tam*" suit in the name of the United States, and allows the initiator of the suit, the "relator," to share in the proceeds of any recovery. *See* 31 U.S.C. §§ 3730-3733. Congress amended the FCA in 1986 to make it easier for relators and the United States to litigate cases, expanding it to "reach all fraudulent attempts to cause the Government to pay out sums of money or to deliver property or services." S. Rep. No. 99-345, at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5274. Among the principal problems prompting the passage of the 1986 amendments was the lack of a credible deterrent to fraudulent conduct: "Fraud is perhaps so pervasive and, therefore, costly to the Government due to a lack of deterrence." *Id.* at 3, *reprinted in* 1986 U.S.C.C.A.N. at 5268.

The 1986 amendments deterred fraud in several ways. First, the 1986 amendments substantially increased financial incentives for *qui tam* relators to bring suit, particularly in cases where the United States elects not to intervene.[3] Second, the 1986 amendments lowered the

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[2] While WLF submits that the conflict among the circuits on the question presented alone warrants review, WLF will focus its brief on the legal and policy issues implicated by the question presented that further underscore the importance of this case.

[3] Though *qui tam* lawsuits may be initiated by private citizens, the Department of Justice may choose to participate as of right in a

standard of proof to establish an FCA violation. To create liability, a relator need not prove intent to defraud, but only a knowing submission of a false claim. Under the FCA, "knowing" means: 1) actual knowledge of the falsity of information, 2) acting with conscious ignorance as to the truth or falsity of the information, or 3) acting with reckless disregard as to the truth or falsity of the information. 31 U.S.C. § 3729(b).[4] Third, the 1986 amendments imposed treble damages and penalties. 31 U.S.C. § 3729(a).

An FCA defendant faces even more severe collateral penalties, such as debarment from government contracting or, in cases such as this, exclusion from the Medicare

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relator-initiated action. *See* 31 U.S.C. §§ 3730-3733. Prior to the 1986 amendments, relators' awards were limited to 10 percent in cases of government intervention, and 25 percent in non-intervention cases. *See* 31 U.S.C. § 3730(c) (1982). Today, when the government intervenes in a *qui tam* action, the relator's share in a recovery is at least 15 percent but not more than 25 percent of the proceeds. *See* 31 U.S.C. § 3730(d)(1). If the United States *does not* join in the suit, a relator's recovery *increases* to between 25 and 30 percent of the proceeds. *See* 31 U.S.C. § 3730(d)(2).

While relators hope that the Department of Justice will intervene and give them a free litigation ride, even when the Department declines to do so, relators have many incentives to continue to press tortured claims based upon ambiguous or complex regulations. In addition to reaping a higher percentage of the settlement, the *qui tam* relator can be awarded reasonable expenses, attorneys' fees, and costs. *Id.* These financial rewards have created a powerful private litigation incentive, which has led to a rapid proliferation of FCA actions and recoveries over the last 20 years, and forced settlements of cases of dubious merit.

[4] *See United States v. Newport News Shipbuilding, Inc.*, 276 F. Supp. 2d 539, 566 (E.D. Va. 2003) (allowing an FCA suit to proceed under an admittedly ambiguous regulation because a fact finder nonetheless "might conclude" that the defendant acted with reckless disregard as to the permissibility of charges under the regulation).

programs, if FCA liability is found. These collateral penalties are a virtual death sentence for a business and its employees.

FCA litigation exploded after the 1986 amendments. According to Department of Justice statistics, combined settlements and judgments arising from *qui tam* lawsuits skyrocketed from $390,431 in 1988 to $1,141,743,736 in 2005.[5] Of these, relators' award shares increased from $97,388 in 1988 to $166,375,477 in 2005.[6] Notably, in cases where the United States *declined* to intervene, relators' award shares multiplied more than 700 times.[7]

### B. FCA Actions Based on Complex and Ambiguous Regulations and Contract Provisions Encourage Frivolous *Qui Tam* Suits That Do Not Deter Fraud or Promote the Public Interest

Highly complex regulations and contract provisions are a ripe breeding ground for frivolous *qui tam* suits. As one federal prosecutor acknowledged, "[t]he passage of time seldom brings a simplification or reduction of law, regulation, guidance, and informal advice; rather, accretion and increasing complexity are the characteristics of any mature bureaucratic system. Complexity in regulation feeds on itself." Joan H. Krause, *Regulating, Guiding, and Enforcing Health Care Fraud*, 60 N.Y.U. Ann. Surv. Am. L. 241, 275 (2004) (quotation marks and citations omitted). This phenomenon has become increasingly evident in FCA litigation, as illustrated by judicial observations regarding

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[5] 2006 Justice Department Qui Tam Statistics, *available at* http://www.taf.org/fcastatistics_2006.pdf.

[6] *Id.*

[7] *Id.*

the complexity of regulations giving rise to *qui tam* cases across many sectors, including health care,[8] government contracting,[9] and federal taxation.[10]

These ambiguous regulations often result in FCA actions that stretch the statute beyond recognition. *United States v. Data Translation, Inc.*, 984 F.2d 1256 (1st Cir. 1992), is a particularly egregious example. There, the government brought an FCA suit against a contractor based on its offer to sell computer circuit boards. The purported "false claim" arose from Data Translation's alleged failure to disclose all of the prices at which it had sold the computer board to commercial customers, supposedly contrary to General Services Administration procurement policies and disclosure requirements. Then Chief Judge Breyer found the government's theory of liability to be almost incredible:

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[8] *See In re Cardiac Devices Qui Tam Litig.*, 221 F.R.D. 318, 354 (D. Conn. 2004) ("Clearly, the Medicare reimbursement regulations would qualify as highly technical and complex."); *see also United States ex rel. Schuhardt v. Wash. Univ.*, 228 F. Supp. 2d 1018, 1026 (E.D. Mo. 2002) ("The teaching physician reimbursement regulations concern a regulatory program, under Medicare, that is without a doubt complex and highly technical.") (quotation marks and citations omitted).

[9] *See H.B. Mac, Inc. v. United States*, 36 Fed. Cl. 793, 816 (1996) (discussing the "complex, poorly-worded, [small disadvantaged business] regulations relating to control of a business for purposes of determining whether plaintiff knowingly misrepresented or willfully disregarded its status and, thereby, attempted to perpetrate a fraud upon the United States").

[10] *See United States ex rel. Lissack v. Sakura Global Capital Mkts., Inc.*, 377 F.3d 145, 147 (2d Cir. 2004) (FCA action concerning a "highly complex financial scheme involving tax-exempt state and local government (municipal) bonds . . . which lies at the intersection between finance and tax law").

> We concede the circumstance to which the Government points with pride, namely, the exhaustiveness of the disclosure that the language literally demands. But, it is that very circumstance that creates a problem. Exaggerating to explain our point, we find the Government's interpretation a little like that of, say, a park keeper who tells people that the sign "No Animals in the Park" applies literally and comprehensively, not only to pets, but also to toy animals, insects, and even chicken sandwiches. If one met such a park keeper, one would find his interpretation so surprisingly broad that one simply would not know what he really meant or what to do. We do not mean to say this farfetched example directly applies here. But, the example . . . may help the reader understand why we think a literal reading of the disclosure form creates ambiguity and incomprehensibility, and why we conclude that no reasonable person, negotiating with GSA negotiator Carr, could have believed that the Government really wanted the complete and total disclosure for which the language seems to ask.

*Id.* at 1261. *Data Translation* illustrates how ambiguous and confusing statutory or regulatory requirements can easily spawn contrived FCA actions based on a defendant's reasonable interpretation of those requirements, rather than on fraudulent acts that Congress intended to deter and punish. To allow such FCA actions runs the risk that the substantial punitive and collateral penalties under the FCA will be inconsistently and unfairly imposed.

### C. The Court of Appeals' Expansive Approach to FCA Liability Neither Deters Fraud nor Promotes the Public Interest

As this Court has noted, "*qui tam* relators are . . . motivated primarily by prospects of monetary reward rather than the public good . . . [and] are thus less likely than is the Government to forgo an action arguably based on a mere technical noncompliance . . . that involved no harm to the public fisc." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997). Where ambiguous regulations and contract provisions provide a turn-key platform for an enormous windfall, financial motivation can lead to a rapid proliferation in FCA claims that neither deter fraud nor promote the public interest. This is best evidenced by the fact that the Department of Justice only intervenes in approximately 20 percent of *qui tam* actions.[11]

The proliferation of private FCA suits based on ambiguous regulations and contract provisions is at odds with the fraud deterrent and public interest objectives of the FCA for several reasons. First, private plaintiffs "may be insufficiently sensitive to the litigation costs of their suits (including the drain on judicial resources) . . . [and] may be less sensitive than government agencies to the economic and social costs of particular enforcement actions, such as the disruptive impact on affected communities, relative to the social benefits of such actions." Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91

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[11] Michael Lawrence Kolis, Comment, *Settling for Less: The Department of Justice's Command Performance Under the 1986 False Claim Amendments Act*, 7 Admin. L.J. Am. U. 409, 412 n.13 (1993).

Va. L. Rev. 93, 114-15 (2005). Private litigants also are likely to be less sensitive to the possibility that a *qui tam* action may result in the termination of a company's ability to do business with the government, resulting in bankruptcy for the company and the near certain loss of jobs for employees having no part in the false claims.

Moreover, unlike federal prosecutors, private relators have no accountability for the social and economic impact of their decisions to initiate *qui tam* actions. Prosecutorial discretion, of course, is "an integral part of the American system of government, and executive agencies are accountable to the electorate for their exercise of this discretion through the President and, more indirectly, through congressional oversight." *Id.* at 119. For that reason, the United States Attorneys' Manual stresses that "the manner in which Federal prosecutors exercise their decision-making authority has far-reaching implications, both in terms of justice and effectiveness in law enforcement and in terms of consequences for individual citizens." USAM, 9-27.000, Principles of Federal Prosecution.[12]

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[12] The lack of executive involvement in the prosecution of private *qui tam* cases, coupled with the lack of accountability to the public, raises a question as to the constitutionality of the private enforcement provisions of the FCA under both the Appointments Clause and the Take Care Clause of the Constitution. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 140 (1976) (holding that Appointments Clause of the Constitution prohibits vesting "primary responsibility for conducting civil litigation . . . for vindicating public rights" in persons not properly appointed under the Appointments Clause); *Morrison v. Olson*, 487 U.S. 654, 696 (1988) (instructing the President, pursuant to the Take Care Clause, to retain substantial control over any person charged with executive functions). This question, while not raised here, was reserved by the Court in *Vermont Agency of Natural*

Prosecutorial discretion also has a substantial impact on the deterrence of fraud and the overall effectiveness of the FCA regime. For instance, the Department of Justice "has an interest not simply in prosecution and punishment but also in generating goodwill to persuade companies to improve monitoring procedures. In some cases, leniency by the government will promote goodwill and better future behavior, especially where there is an educational component." Ben Depoorter & Jef De Mot, *Whistle Blowing: An Economic Analysis of the False Claims Act*, 14 Sup. Ct. Econ. Rev. 135, 154 (2006). Stated differently, sometimes full-scale litigation under the FCA is not the best tool to deter fraud in a manner consistent with the public interest. This is particularly true given the magnitude of the penalties that confront a business that faces liability-triggering ambiguous regulations.

### D. The Punitive Features of the FCA, and Its Severe Collateral Sanctions, Are Disproportionate When Imposed Under Ambiguous Regulations and Contract Provisions

This Court has recognized that the FCA's damage scheme is punitive in nature. *See Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 785-86 (2000). Moreover, "the very idea of treble damages [present in the FCA] reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers." *Id.* at 786 (quotation marks and citations omitted); *see also Cook County, Ill. v. United States ex rel. Chandler*, 538 U.S. 119, 130-32 (2003) (acknowledging punitive features under FCA damages scheme).

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*Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000).

In addition to this punishment, entities found liable under the FCA also face collateral penalties that may greatly exceed those imposed by the statute. For example, the Federal Acquisition Regulations provide that government contractors may be debarred or suspended from obtaining or performing government contracts if they are found liable for an FCA violation. *See* 48 C.F.R. § 9.406-2 (2006). For companies doing substantial business with the government, this can be a death sentence.

For health care providers, a similar calamitous fate awaits. A health care provider may be excluded from the Medicare program under Title IX of the Social Security Act for violation of the FCA. *See* 42 U.S.C. § 1320(a); 42 C.F.R. § 1001 (2006). As the federal government pays for approximately one half of the health care costs in the United States, exclusion from federal health care programs can drive a provider into an operating loss. Moreover, because health care providers, unlike defense contractors, tend to submit a large number of small claims each year, statutory penalties "can reach astronomical proportions."[13] Joan H.

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[13] The FCA provides statutory penalties of $5,500 to $11,000 per claim, regardless of the size of the claim. 31 U.S.C. § 3729(a); *Civil Monetary Penalties Inflation Adjustment*, 64 Fed. Reg. 47,099 (Aug. 30, 1999). Indeed, when individual claim value – and therefore actual damages – is very low, relators and the Department of Justice focus upon these disproportionately large penalties. For a medical provider that routinely submits a large number of small claims, these penalties may quickly escalate. Similarly, a government contractor selling services through the General Services Administration's Federal Supply Schedule may process hundreds or thousands of government sales per day. FCA liability arising under those sales can result in heavy penalties for seemingly minor violations. *See* Christopher Yukins *et al.*, *International Procurement*, 40 Int'l Law. 337, 346 (2006).

Krause, *Promises to Keep: Health Care Providers and the Civil False Claims Act*, 23 Cardozo L. Rev. 1363, 1370 (2002). In fact, many health care providers are forced to settle rather than challenge an FCA action and expose themselves to the draconian punitive and collateral penalties under the FCA. Timothy Stoltzfus Jost & Sharon L. Davies, *The Empire Strikes Back: A Critique of the Backlash Against Fraud and Abuse Enforcement*, 51 Ala. L. Rev. 239, 241-43 (1999). Other commentators have observed that "[b]ecause the False Claims Act permits fines of up to three times the amount of the claim – and penalties of between $5,500 and $11,000 per claim – penalties can add up quickly to billions of dollars, [providing] an enormous 'hammer' with which to exact settlements." John B. Reiss & William M. Janssen, *Your Business in Court*, FDLI Update, Mar./Apr. 2005, at 4.

In the health care context, the threat of penalty and exclusion can have an even greater adverse social impact – doctors and other health care providers will simply refuse to participate in Medicare or any similar government reimbursement program and limit their practices to non-governmental third-party payors (insurance companies) and more wealthy private payors. The elderly and those less fortunate will suffer most.

To be sure, the combination of treble damages and collateral penalties forms a powerful deterrent against fraud. As one commentator notes, "[t]he sanctions imposed in [punitive civil] actions [such as the FCA] can have enormous deterrent impact for they impose large penalties and can lead to imposition of collateral sanctions, such as exclusion from conducting future business or from one's profession altogether." Pamela H. Bucy, *Information as a Commodity in the Regulatory World*, 39 Hous. L. Rev. 905,

918 (2002) (footnote omitted). But the unfair or inconsistent application of these penalties may result in manifest injustice because individuals and companies do not have a clear statement of what kind of conduct is prohibited under the law. This problem now has become far more acute, thanks to the proliferation of FCA actions such as this one seeking to punish individuals and companies for honest and reasonable interpretations of ambiguous statutes, regulatory schemes, contract provisions, guidance, and directives.

### E. The Rule of Lenity Should Be Applied in FCA Cases Involving Ambiguous Regulations and Contract Provisions

Modern FCA actions brought under the unfair and inconsistent application of highly complex regulatory schemes and contract provisions have the potential to bankrupt those found liable. Given this potential, and the mushrooming of FCA litigation during the last 20 years, the regulated community and government contractors should not be subjected to the unfair application of the FCA. As a matter of due process, they should be given clear warning of what conduct might give rise to FCA liability.

This Court frequently has invoked the rule of lenity to require that ambiguities in criminal statutes be resolved in favor of defendants. *See Liparota v. United States*, 471 U.S. 419, 425 (1985) (finding it appropriate to apply the rule of lenity to avoid "criminaliz[ing] a broad range of apparently innocent conduct"); *see also Staples v. United States*, 511 U.S. 600 (1994); *Rewis v. United States*, 401 U.S. 808 (1971); *Ladner v. United States*, 358 U.S. 169 (1958) (recognizing rule of lenity). The Court also has applied the rule in the civil context. *See United States v.*

*Thompson/Ctr. Arms Co.*, 504 U.S. 505, 517-19 & n.10 (1992) (plurality opinion) (employing the rule of lenity to interpret "a tax statute . . . in a civil setting" because the statute "has criminal applications"); *id.* at 519 (Scalia, J., concurring in judgment) (also invoking the rule of lenity); *see also Austin v. United States*, 509 U.S. 602, 619-22 (1993) (holding that civil drug forfeitures under 21 U.S.C. § 881(a)(4), (7) are punishment under the Eighth Amendment's Excessive Fines Clause); *United States v. One 1973 Rolls Royce*, 43 F.3d 794, 819 (3d Cir. 1994) (Section 881(a)(4) forfeiture "is punitive and quasi-criminal in nature.").

The rule of lenity rests on two fundamental due process principles. First, that "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 704 n.18 (1995) (quotation marks and citations omitted). Second, that "legislatures and not courts should define criminal activity." *Id.*

The first of these principles, clear and fair warning, is necessary to ensure that the penalties under the FCA are imposed fairly, and that the statute's deterrent effect is preserved. The second concept is equally important: that Congress be given the opportunity to define the scope and reach of the FCA – not the courts, and certainly not relators motivated primarily by financial gain.

Complex and ambiguous regulatory and contract provisions are common in a wide variety of regulated industries, from health care to government contracting. Businesses operating within these industries, as well as government regulators, are constantly required to make

reasoned judgments about the meaning and application of these regulations and contract provisions. While there is no question that honest disagreements will arise under these complex and ambiguous regulations and provisions, and that there are non-punitive methods to resolve those disagreements, there is also no question that such disagreements are a far cry from fraud. The decision below contravenes the rule of lenity and would improperly allow use of the FCA to punish unfairly government contractors or health care providers that guessed wrong.

## CONCLUSION

For the foregoing reasons and those presented by Petitioner, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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